Supreme Court, U.S.
FILED

No. ——— 97 1817 MAY 11 1998

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SMILAND PAINT COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The two questions presented by this petition for writ of certiorari are:

Where the U.S. Environmental Protection Agency ("EPA") has nondiscretionary duties under Section 183(e) of the Clean Air Act (the "CAA"), 42 U.S.C. § 7511b(e), initially to conduct a study of emissions of organic compounds into the air from consumer and commercial products in order to determine their potential to contribute to ozone levels violating EPA's standard and establish criteria for regulating certain such products, and to list in four groups the products to be regulated, and subsequently to promulgate multiple regulations of such products over an eight-year period based on such study and list; where EPA has failed to perform the initial nondiscretionary study and listing duties; and where EPA nevertheless threatens to propose and promulgate such regulations without having first established the necessary prerequisites:

(1) Is a U.S. district court impliedly prohibited from ordering EPA to perform such study and listing duties under CAA Section 304(a), the "citizen suit" provision, 42 U.S.C. § 7604(a), because it is possible that one or more of the regulations scheduled to be adopted by EPA in the future may be reviewed and reversed in the D.C. Circuit Court of Appeals under CAA Section 307(a)(1), 42 U.S.C. § 7607(b)(1)?

(2) Is a U.S. district court barred under the ripeness doctrine from ordering EPA to perform such study and listing duties under Section 304(a) because it is possible that one or more of the regulations scheduled to be adopted by EPA in the future may be reviewed and reversed in the D.C. Circuit Court of Appeals under Section 307(b)(1)?

RULE 29.6 LIST

None of the petitioners has a parent company or a nonwholly owned subsidiary.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Smiland Paint Company, Gemini Coatings, Inc., Conco Paint Company, Triangle Coatings, Inc., Trinity Coatings Company, X-I-M Products, Wampler Industrial Coatings, and Preservo Paint & Coatings Manufacturing pray that a writ of certiorari issue to review Part I of the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals, reproduced as Appendix A, is unpublished. Its order denying a petition for rehearing, and rejecting a suggestion for rehearing *en banc*, is reproduced as Appendix B. The ruling of the U.S. District Court for the Central District of California, reproduced as Appendix C, is unpublished.

JURISDICTION

The Court of Appeals decision was filed and judgment entered on August 27, 1997. Its subsequent order was filed on February 9, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 183(e)(2) of the CAA, 42 U.S.C. § 7511b (e)(2) (as added November 15, 1990), provides as follows:

> "(A) The [EPA] Administrator shall conduct a study of the emissions of volatile organic compounds into the ambient air from consumer and commercial products (or any combination thereof) in order to—
>
> (i) determine their potential to contribute to ozone levels which violate the national ambient air quality standard for ozone; and
>
> (ii) establish criteria for regulating consumer and commercial products or classes or categories thereof which shall be subject to control under this subsection.
>
> The study shall be completed and a report submitted to Congress not later than 3 years after November 15, 1990.
>
> (B) In establishing the criteria under subparagraph (A)(ii), the Administrator shall take into consideration each of the following:
>
> (i) The uses, benefits, and commercial demand of consumer and commercial products.
>
> (ii) The health or safety functions (if any) served by such consumer and commercial products.
>
> (iii) Those consumer and commercial products which emit highly reactive volatile organic compounds into the ambient air.

(iv) Those consumer and commercial products which are subject to the most cost-effective controls.

(v) The availability of alternatives (if any) to such consumer and commercial products which are of comparable costs, considering health, safety, and environmental impacts."

Section 183(e)(3)(A) of the CAA, 42 U.S.C. § 7511b (e)(3)(A), provides, in relevant part, as follows:

"Upon submission of the final report under paragraph (2), the Administrator shall list those categories of consumer or commercial products that the Administrator determines, based on the study, account for at least 80 percent of VOC emissions, on a reactivity-adjusted basis, from consumer or commercial products in areas that violate the NAAQS for ozone. . . . At such time, the Administrator shall divide the list into 4 groups establishing priorities for regulation based on the criteria established in paragraph (2)."

Section 304(a) of the CAA, 42 U.S.C. § 7604(a), provides, in relevant part, as follows:

"[A]ny person may commence a civil action on his own behalf— . . .

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Adminitsrator . . .

The district court shall have jurisdiction . . . to order the Administrator to perform such act or duty. . . ."

Section 183(e)(3)(A) of the CAA, 42 U.S.C. § 7511b (e)(3)(A), also provides, in relevant part, as follows:

"Every 2 years after promulgating such list, the Administrator shall regulate one group of categories until all 4 groups are regulated. The regulations shall require best available controls as defined in this section. . . ."

Section 183(e)(1)(A) of the CAA, 42 U.S.C. § 7511b (e)(1)(A), defines that term as follows:

> "The term 'best available controls' means the degree of emissions reduction that the Administrator determines, on the basis of technological and economic feasibility, health, environmental, and energy impacts, is achievable through the application of the most effective equipment, measures, processes, methods, systems or techniques, including chemical reformulation, product or feedstock substitution, repackaging, and directions for use, consumption, storage, or disposal."

Section 307 of the CAA, 42 U.S.C. § 7607, provides, in relevant part, as follows:

> "(b)(1) A petition for review of . . . any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. . . .
>
> "(d)(1) This subsection applies to— . . .
>
> (O) the promulgation of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title. . . .
>
> (9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action . . . .
>
> "(e) Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section."

STATEMENT OF THE CASE

A. Ozone and Consumer and Commercial Products

In 1990 Congress amended the CAA to add *inter alia* certain measures regarding the control of ozone. Ozone, the triatomic form of oxygen, has been designated by

EPA as a criteria pollutant and has been made subject by EPA to a federal air quality standard. 42 U.S.C. §§ 7408, 7409. Ozone is formed through the interaction of sunlight and oxides of nitrogen.

Many thousands of products contain organic compounds. These products, in turn, contain hundreds of different kinds of organic compounds. Certain organic compounds, including those emitted by certain products, if sufficiently volatile and reactive, at certain times and in certain places may contribute to nonattainment of the ozone standard. Other organic compounds emitted by products are neither sufficiently volatile, sufficiently reactive, nor present at a time or place where they could contribute to ozone nonattainment.

B. EPA's Failure to Perform Mandatory Duties

Section 183(e)(2)(A)(i) mandates:

> "The Administrator shall conduct a study of the emissions of volatile organic compounds into the ambient air from consumer and commercial products (or any combination thereof) in order to . . . determine their potential to contribute to ozone levels which violate the national ambient air quality standard for ozone . . . ."

As to the first part of the required study, EPA has never studied, let alone made the required determinations about, the reactivity of the individual organic compounds emitted by products, which vary enormously in their potential to contribute to ozone nonattainment. EPA never conducted an assessment of the relative reactivities of the organic compound species emitted by consumer and commercial products vis-a-vis the relative reactivities of other organic compound species known to be emitted into the atmosphere. CR 25 at 4. EPA also failed to assess the relative volatility of any organic compound species emitted by consumer and commercial products. Nor has EPA ever determined such potential in any nonattainment or attainment area, which differ widely as to weather con-

ditions, organic compound mix, and ratio of organic compounds to the primary ozone precursor. Although specifically instructed to assess the role of organic compounds in fostering ozone nonattainment, EPA compared only organic compound emissions from consumer and commercial products nation-wide with nation-wide man-made organic compound emissions. CR 25 at 5. Further, EPA gave no consideration to biogenic or natural organic compounds which are recognized to be the major source of organic compounds on a national basis and a significant source within many nonattainment areas. CR 25 at 6. EPA also ignored the role of emissions of oxides of nitrogen which are recognized to be the critical ingredient limiting levels of ozone in many nonattainment areas. *Id.*[1]

Petitioners formally requested the EPA Administrator to conduct the mandated study of organic compound emissions from consumer and commercial products and to make the required determinations of their potential to contribute to ozone levels exceeding the ozone standards, and gave notice under Section 304(b). The Administrator did not do so.

Section 183(e)(2)(A)(ii) additionally mandates that the Administrator shall also conduct the study ". . . in

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[1] The study and determinations were to be completed and reported by November 15, 1993. 42 U.S.C. § 7511b(e)(2)(A). EPA issued a report in March 1995 which did not contain the study nor the determinations at issue (the "Report"). The Report concedes that it addressed grossly dissimilar compounds and grossly dissimilar geographic areas only "collectively." CR 12 at 2-4. EPA admitted in the Report that it was neither "rigorous" nor "robust." *Id.* at 2-9. The Report acknowledged that any product's potential to contribute to ozone nonattainment is dependent, among other things, on "how individual species . . . participate in the photochemical reactions which result in ozone formation." *Id.* at 2-4. The Report also acknowledged that "different VOC species have different ozone forming potentials." *Id.* at 3-2. The Report admitted that the ozone-forming potential of any species is strongly influenced by the "other VOC" in a given airshed, "the VOC-to-NO_x ratio" therein, and "irradiation conditions" therein. *Id.* at 3-3.

order to . . . establish criteria for regulating consumer and commercial products or classes or categories thereof which shall be subject to control under this subsection." Section 183(e)(2)(B) further mandates:

> "In establishing the criteria under subparagraph (A)(ii), the Administrator shall take into consideration each of the following:
>
> (i) The uses, benefits, and commercial demand of consumer and commercial products.
>
> (ii) The health or safety functions (if any) served by such consumer and commercial products.
>
> (iii) Those consumer and commercial products which emit highly reactive volatile organic compounds into the ambient air.
>
> (iv) Those consumer and commercial products which are subject to the most cost-effective controls.
>
> (v) The availability of alternatives (if any) to such consumer and commercial products which are of comparable costs, considering health, safety, and environmental impacts."

As to the second part of the study, EPA has never taken into consideration three factors mandated by Section 183(e)(2). As stated above, EPA has not considered, as required, those products which emit highly reactive compounds. Furthermore, it has not considered the availability of alternatives to such products which are of comparable costs, nor those products which are subject to the most cost-effective controls.

With respect to comparable costs, EPA did not consider the cost of any possible regulation of any product. CR 25 at 16.

With respect to cost-effectiveness, EPA never attempted to analyze which products or activities to regulate in connection with the type and stringency of regulation to be applied in any particular context. CR 25 at 13. EPA

completely ignored any assessment of the efficacy of alternative modes of regulation. CR 25 at 14.

Instead of considering the five statutory factors, EPA's Report gave controlling weight to two non-statutory factors, the volume or mass of emissions and previous regulatory actions.[2]

Petitioners demanded that the Administrator perform her non-discriminatory duties to conduct that study and establish those regulatory criteria, taking into consideration each of those five statutory factors. The Administrator did not do so.

Section 183(e)(3)(A) further mandates, as follows:

> "Upon submission of the final report under paragraph (2), the Administrator shall list those categories of consumer or commercial products that the Administrator determines, based on the study, account for at least 80 percent of the VOC emissions, on a reactivity-adjusted basis, from consumer or commercial products in areas that violate the NAAQS for ozone . . . . At such time, the Administrator shall divide the list into 4 groups establishing priorities for regulation based on the criteria established in paragraph (2) . . . ."

As discussed above, no statutory study exists on which to establish, and divide, a statutory list. Furthermore, most compounds emitted by products were never accounted for by EPA on a reactivity-adjusted basis, as required.[3]

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[2] The Report conceded that EPA "does not have information" on the costs of regulations that effectively prohibit products. CR 12 at 4-8, 9. The Report admitted that, in developing control measures for products, EPA must select "the most cost-effective controls." *Id.* at 2-2. It conceded that a product "must be able to be compared with other products" with regard thereto. *Id.* at 2-4. The Report also formally established two non-statutory criteria and employed those criteria in assessing potential regulations. *Id.* at 4-12, 13.

[3] On March 23, 1995 EPA exempted 15 groups of products from regulation and scheduled 21 groups of products, divided into four groups, for regulation between 1997 and 2003, seven of which,

Petitioners demanded that the Administrator list categories based on a statutory study and divide the list based on statutory criteria, and account for the emissions in question on a reactivity-adjusted basis. The Administrator did not do so.

C. District Court Proceedings

On September 10, 1996 petitioners, manufacturers of architectural coatings, filed in the District Court a complaint for mandatory injunctive relief against EPA, its Administrator and certain individual employees of EPA (collectively, 'EPA") under Section 304(a) based on EPA's failure to perform the above nondiscretionary statutory duties. The unperformed duties included study, determination, consideration and establishment duties under Section 183(e)(2) of the CAA and listing, dividing and accounting duties under Section 183(e)(3)(A) of the CAA, which respect to all consumer and commercial products.[4]

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including "consumer products," "autobody refinishing coatings," and "architectural coatings," were included in the first group (the "Schedule"). 60 Federal Register 15264. The Schedule acknowledged that control of products should be based on data about "individual species" of organic compounds as well as conditions in "specific airsheds." *Id.* at 15266. The Schedule acknowledged that EPA had considered reactivity only "to a limited extent." *Id.* It also conceded that EPA had "relatively limited" data about cost-effectiveness of controls for most products. *Id.* at 15265, 15268. The Schedule admitted that EPA had ranked products for regulation based on two non-statutory criteria. *Id.* at 15266.

[4] Petitioners' claims also included EPA's failures to publish a statement of basis and purpose under Section 307(d)(3) of the CAA, failure to prepare a cost-benefit analysis under Section 202(a) of the Unfunded Mandates Reform Act of 1995, and failure to analyze small business impacts under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, with respect to a proposed architectural coatings rule which is discussed in Section E below.

On September 30, 1996 petitioners filed a motion for summary judgment on their claims. CR 6. In support of their motion, petitioners submitted the declarations of Professor William L. Chameides of the Georgia Institute of Technology regarding Congress' use of scientific terms in Section 183(e) and Professor W. Kip Viscusi of the Harvard Law School regarding its use of economic terms. CR 25. On November 8, 1996 EPA filed a cross-motion for summary judgment. CR 12. In its opposition to petitioners' motion for summary judgment EPA conceded the district court's jurisdiction under Section 304(a) to hear petitioners' claims for failure to obey Section 183(e) of the CAA.[5]

During oral argument before the district court, EPA expressly conceded on at least nine occasions that the court had jurisdiction to hear petitioners' Section 183(e) study and listing claims. CR 33 at 6, 8, 10, 13, 15, 17, 18, 19, 23. Although EPA had conceded jurisdiction on petitioners' claims under Section 183(e), the district court raised the issue, *sua sponte*, at oral argument, stating, "I think there has to be a determination as to whether there is jurisdiction on any of these claims before I start deciding some of the claims." CR 33 at 8.

On February 13, 1997, the district court granted EPA's cross-motion for summary judgment without findings of fact, conclusions of law or opinion. On February 14, 1997 judgment was entered in favor of EPA.

D. Ninth Circuit Proceedings

Petitioners timely appealed arguing that the district court had jurisdiction under Section 304(a)(2) of the

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[5] The Chemical Specialities Manufacturers Association and the Cosmetic, Toiletry, and Fragrance Association, two national trade associations, were granted leave to appear as *amici curiae* in opposition to petitioners' motion for summary judgment. The trade associations represented manufacturers of consumer products whose products were listed in the first group scheduled for regulation, and actually so proposed, as discussed in Section E below.

CAA to order EPA to perform its mandatory study and listing duties, and that this claim for relief was ripe for judicial review.

Part I of the Ninth Circuit's Opinion, entered and filed on August 27, 1997, holds: "We lack jurisdiction to consider" petitioners' claims seeking to order EPA to perform its nondiscretionary study and listing duties. The Court disposed of the appeal, as follows: "DISMISSED for lack of jurisdiction." The Court dismissed the case for lack of jurisdiction on two related grounds.

First, the Court held: "The EPA has not promulgated final rules or otherwise taken any other final action that is reviewable."[6]

Second, the Court held, as follows:

> "Moreover, CAA Section 307(b)(1) provides that a 'petition for review of . . . any . . . nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia' 42 U.S.C. § 7607 (b)(1), but Plaintiffs filed this petition for review in the United States District Court for the Central District of California."[7]

On October 10, 1997, petitioners filed a petition for partial rehearing and suggestion for partial rehearing *en banc* with respect to Part I of the above Opinion. On

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[6] The only case cited by the Court was the majority opinion in *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349 (9th Cir. 1978). In that case, the majority, in their alternative holding, set aside a district court's mandatory injunction on ripeness grounds. The majority found that judiical interference in the administrative proces at that stage was "premature." *Id.* at 1357.

[7] The Court also stated: "Plaintiffs have not demonstrated that the EPA has failed to perform any nondiscretionary duty." However, because the Court dismissed the appeal for lack of jurisdiction this statement, if construed as a statement about the merits, is dictum. *Maryland National Bank v. Vessel Madam Chapel*, 46 F.3d 895, 902 (9th Cir. 1995).

February 9, 1998, the Court of Appeals filed an order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc*.

E. Proposed Rulemaking by EPA

On April 2, 1996 EPA had issued a proposed rule for a wide variety of consumer products including hair sprays, deodorants and nail polish removers. 61 Federal Register 14531. On April 30, 1996 EPA had issued a proposed rule for motor vehicle refinish coatings. 61 Federal Register 19005. On June 25, 1996 EPA published a preamble to a proposed rule for architectural coatings. 61 Federal Register 32729. On September 3, 1996 EPA had published the text of a proposed rule for architectural coatings. 61 Federal Register 46410.

To date, EPA has adopted no final rules regulating any consumer or commercial product.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION, THAT THE POTENTIAL FOR CIRCUIT COURT REVIEW OF POSSIBLE FUTURE RULEMAKING ACTIONS UNDER SECTION 307 FORECLOSES THE AVAILABILITY OF IMMEDIATE DISTRICT COURT REVIEW OF ACTUAL STUDY AND LISTING INACTION UNDER SECTION 304, CONFLICTS WITH THE DECISIONS OF SEVERAL CIRCUIT COURTS.

The Court of Appeals has decided the question of the district court's jurisdiction under Section 304 of the CAA in a way that conflicts with the decisions of several other circuit courts. The Ninth Circuit's decision would foreclose the present availability of jurisdiction under Section 304 whenever the present inaction may potentially be reviewed at some indeterminate time in the future under the provisions of Section 307, which authorizes review and reversal of any regulation. This conflict should be resolved, and in favor of early relief in a district court.

The Court of Appeals' decision is consistent with the holding of the Ninth Circuit in *Kamp v. Hernandez*, 752

F.2d 1444 (9th Cir. 1985). In *Kamp*, plaintiff had challenged EPA's approval of Arizona's plan for the control of certain emissions from copper smelters, in part because EPA had failed to require controls on fugitive emissions from the smelters. EPA argued that the court had no jurisdiction to review its failure to promulgate a control strategy because such challenges must be brought in the district court pursuant to Section 304. *Id.* at 1454. The court rejected this argument holding that when a challenge to agency inaction 'is embedded in a challenge to the validity" of subsequent final action jurisdiction lies in the circuit court reviewing the final action. *Id., quoting Indiana & Michigan Electric Co. v. EPA*, 733 F.2d 489, 490 (7th Cir. 1984). Thus, as long as the claimed failure to act may be reviewed in connection with any subsequent final action, the district courts have no jurisdiction to hear an immediate challenge to the existing inaction.

This analysis of the CAA's bifurcated jurisdictional scheme is also followed by the Tenth Circuit. In *Anaconda Co. v. Ruckelshaus*, 428 F.2d 1301 (10th Cir. 1973) plaintiff sought an injunction in the district court against EPA's promulgation of a rule controlling emissions of sulphur oxides in a portion of Montana until certain preliminary steps were taken. The district court granted the injunction. *Id.* at 1303. In reversing the district court's ruling, the court of appeals held that because the circuit court would have exclusive jurisdiction over challenges to EPA's final rules, any alleged failures to take necessary precursor steps to such rulemaking were also within the circuit court's jurisdiction. "It follows then that where, as here, Congress has specifically designated a forum for judicial review of administrative action and does so in unmistakable terms except under extraordinary conditions, that forum is exclusive." *Id.* at 1304-05.

However, several other circuits allow immediate challenges to EPA's failures to perform nondiscretionary acts regardless of whether such acts are the preliminary steps in future rulemaking procedures. In *Sierra Club v.*

Thomas, 828 F.2d 783 (D.C. Cir. 1987), plaintiff sought to compel EPA to complete rulemaking regarding sources of pollutants that would be subject to fugitive emissions regulation. In discussing the type of "final agency action" over which the circuit courts have jurisdiction under Section 307 the D.C. Circuit stated:

> "Under the Clear Air Act's unusual, bifurcated jurisdictional scheme, however, a claim of 'agency recalcitrance . . . in the face of a clear statutory duty' would in most instances represent a claim that EPA had failed to perform a nondiscretionary duty. As we have indicated, such a claim must be brought in the district court, under Section 304(a)(2)." *Id.* at 794.

Thus, the district court's jurisdiction over failures to perform nondiscretionary duties exists even where final action to follow may relate to those same duties. See *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, 255 (D.D.C. 1972).

Similarly, in *Environmental Defense Fund v. Thomas*, 870 F.2d 892, 899 (2nd Cir. 1989), cert. denied 493 U.S. 991 (1989), the Second Circuit held that the district court had jurisdiction over plaintiff's claim that EPA had a nondiscretionary duty to take some action regarding the national standard for sulphur oxides even if the substance of EPA's eventual decision would be reviewable in the circuit court. Foreclosing the district court's jurisdiction in such a situation would result in "leaving the matter in a bureaucratic limbo" subject to neither district court nor circuit court review. *Id.* at 900. The court found that "creating such a bureaucratic twilight zone" could not have been Congress' intent in adopting Section 304(a) the CAA. *Id.*

The Sixth Circuit also follows this approach to the CAA's jurisdictional dichotomy. *Motor Vehicle Manufacturers Assn. v. Costle*, 647 F.2d 675 (6th Cir. 1981), cert. denied 451 U.S. 907 (1981), arose out of CAA Section 207. One subsection thereof mandated that auto

manufacturer part certificates shall be made only under EPA part certification regulations promulgated to carry out the purposes of a second subsection and that EPA shall promulgate part certification regulations by a date certain. The second subsection mandated that, if EPA made certain determinations then it shall prescribe performance warranty regulations which shall require manufacturers to warrant emission contol devices. The third subsection mandated that manufacturers shall furnish instructions which shall correspond to maintenance instruction regulations to be promulgated by EPA. EPA failed to promulgate parts certification regulations or maintenance instruction regulations, but nevertheless proposed promulgation of performance warranty regulations. Motor vehicle manufacturers brought suit in the district court against the EPA Administrator charging that the mandated parts certification and maintenance instruction regulations had not been promulgated by EPA and seeking, among other forms of relief, an order directing EPA to issue both sets of regulations. The district court held that it had jurisdiction under CAA Section 304(a), held that the parts certification and maintenance instruction regulations were "necessary prerequisites" to promulgation of the performance warranty regulations, 647 F.2d at 677, and rendered two of the other forms of relief. On appeal, the Sixth Circuit affirmed that the district court's ". . . *jurisdiction* to grant relief for the EPA's alleged failure to issue the parts certification and maintenance instruction regulations cannot be seriously disputed." *Id.* at 678 (emphasis in original). While the circuit court disapproved of the two forms of relief the district court had awarded, it held that "Section 304 vests the district court with jurisdiction to order the EPA to perform non-discretionary duties." *Id.* Accordingly, the court remanded the case to conduct proceedings to determine the appropriate order.

The rule in the Third Circuit is to similar effect. In *Pennsylvania v. EPA*, 618 F.2d 991 (3rd Cir. 1980), the

court held that the question (whether EPA's failure to regulate post-mining discharges violated a Clean Water Act mandate) was reviewable in the district court under the citizen suit provision of the Act, Section 505, rather than under the section authorizing circuit court review of final action, Section 509. The court stated:

> ". . . [A]n allegation of inadequacy of a set of regulations is quite different from an allegation that a needed regulation was nonexistent. The former case is included within our authority to review under section 509; the latter, however, must be reviewed under section 505." *Id.* at 996.

The court focused on the type of judicial relief necessary to remedy EPA's failure to perform the mandatory duty:

> "We are here asked not to suspend regulations, but to order the promulgation of completely new and different regulations. We hold, therefore, that petitioners are required to seek the relief they ask for from the district court. . . .
>
> ". . . [W]here the only real relief sought is to compel the adoption of an additional standard, the citizens' suit provisions in section 505 suffice." *Id.* at 997.

Thus, the Ninth and other Circuits require that citizens aggrieved by agency inaction during the initial phase of the regulatory process may not sue to compel performance of the mandatory duty in the district court, but must await final action, if any, in the last phase of that process and raise the failure in connection with any circuit court review of that action.

On the other hand, the D.C., Second, Third and Sixth Circuits allow citizens to bring an immediate citizen suit in the district court to compel the agency to perform its nondiscretionary duty so that the necessary prerequisites to subsequent regulatory action may come into being.

This Court should grant certiorari in order to resolve this split in the Circuits.[8]

II. THE NINTH CIRCUIT'S DECISION, THAT THE POTENTIAL FOR CIRCUIT COURT REVIEW OF POSSIBLE FUTURE RULEMAKING ACTIONS UNDER SECTION 307 RENDERS UNRIPE IMMEDIATE DISTRICT COURT REVIEW OF ACTUAL STUDY AND LISTING INACTION, CONFLICTS WITH DECISIONS OF THE D.C. CIRCUIT.

A split between the Ninth and D.C. Circuits also exists as to whether first-step inaction cases are ripe for judicial review in view of possible future appellate court review of any subsequent administrative actions. This split should be resolved by this Court, and in favor of the ripeness principles applied by the D.C. Circuit.

The Ninth Circuit actively applies the ripeness doctrine to deny judicial review after inaction by an agency during the first stage of a two-stage regulatory process. In *Kennecott*, the only case cited by the Ninth Circuit in Part I of its Opinion in the case at bar, the majority's alternative holding was that "judicial intervention at this point in the administrative process [was] inappropriate." 572 F.2d at 1353. The majority held that it was premature

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[8] As petitioners will show if certiorari is granted, allowing review of present agency inaction regardless of its connection to potential future action is consistent with this Court's interpretation of the bifurcated system of review Congress established. First, this Court has acknowledged that a clear expression of congressional intent to create a bifurcated jurisdiction scheme will not be disturbed. *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 197 (1980). Here, Section 304(a) clearly expresses Congress' intent that inaction be remedied in a district court. Second, this Court has ruled that under CAA Section 307, any final action of the Administrator is reviewable in the circuit courts. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 587 (1980). In the same way, any failure of EPA to perform a nondiscretionary duty should be immediately reviewable by the district courts.

to intervene before EPA had a chance to act on the pending proposals for the following reason:

> "Although it is likely the Administrator will act in due course to reject the proposed revision and variance on the ground that constant emission controls are not being employed to the 'maximum extent possible,' we believe it unwise presently to proceed on that assumption. We cannot close our eyes to the fact that this opinion is being written in the year 1978 and that in 1977 the Clean Air Act was significantly amended. Circumstances have changed; we should not assume that both Kennecott and the EPA are unchanged. In any event, at this point we are convinced the judiciary should stand aside. [Citations.]" *Id.* at 1357.

The Ninth Circuit followed a similar approach in *Hawaiian Electric Co. v. EPA*, 723 F.2d 1440 (9th Cir. 1984). EPA refused to modify a utility's permit, even though modification was merited, without the utility's filing additional data and undergoing a more formal investigation. The utility petitioned the Ninth Circuit for review of that refusal. The court denied the petition holding that review was "not ripe." *Id.* at 1441. The court ruled:

> ". . . Review of the merits of the air pollution control demanded of HECO, which is what review of the PSD permit involves, would entangle the court in an uncompleted administrative action whose ultimate resolution will depend on contested factual issues of a technical nature.
>
> ". . . These contentions [of environmental intervenors] combined with EPA's request for more data from HECO indicate numerous factual disputes which an appellate court is ill prepared to assess without the more developed record that will exist following administrative determination of these issues. [Citation.]" *Id.* at 1445.

The D.C. Circuit takes a less restrictive approach to ripeness in the instant context. For example, in *EDF v.*

Hardin, 428 F.2d 1093 (D.C. Cir. 1970) environmental groups asked the agency to issue notices of possible cancellation of DDT registrations and to suspend them pending administrative review. The agency took no action on parts of the request, and the groups petitioned the D.C. Circuit for review of that failure. The court rejected the agency's ripeness defense. *Id.* at 1098-1100. It held that an agency's "faiure to act" under exigent circumstances is "equivalent to a final denial of petitioners' request," and thus, ripe. *Id.* at 1098. Finding such circumstances in the case before it, the court announced this principle: ". . . [W]hen administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief." *Id.* at 1099. As to the interim suspension, the court found that "inaction is tantamount to an order denying suspension." *Id.* As to the cancellation notice, the court ruled: "At some point administrative delay amounts to a refusal to act, with sufficient finality and ripeness to permit judicial review." *Id.* at 1100.

In *Sierra Club v. Thomas*, 828 F.2d at 792-94, the D.C. Circuit stated that review of EPA "inaction" was appropriate in situations where a court had the "ability to provide effective review of final action." *Id.* at 793. First, citing *Hardin*, the court stated that inaction may "effectively" be ripe when the agency "has not frankly acknowledged" its decision. *Id.* Second, it stated that an inaction claim is ripe if it represents "agency recalcitrance . . . in the face of a clear statutory duty . . . of such magnitude that it amounts to an abdication of statutory responsibility" (quoting *PCHRG v. FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984)). *Id.*

In *Sierra Club v. EPA*, 992 F.2d 337 (D.C. Cir. 1993), EPA performed its statutory duty as to municipal

hazardous waste facilities but not non-municipal facilities. EPA stated its "intention to issue revised criteria for non-municipal faculties when it has the data necessary to do so." *Id.* at 347. The court held that this was a failure to perform a nondiscretionary duty which was presently ripe for adjudication. *Id.*

Thus, the Ninth Circuit holds that a failure to perform nondiscretionary duties in the initial phase of a multiphase regulatory process is not ripe for judicial review if the agency may take action in the future which will, itself, be reviewable and reversible.

The D.C. Circuit, on the other hand, finds such inaction presently ripe for judicial review even if the agency may later take further action which, itself, may be subject to judicial review and reversal.

This Court should grant certiorari in order to resolve this conflict in the Circuits.[10]

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[10] Should this case be accepted for review, petitioners intend to argue that this Court's ripeness jurisprudence compels rejection of the Ninth Circuit's view. *E.g., Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-54 (1967) (whether agency rule, resulting in dilemma of complying or risking penalties, complies with statuory requirement is ripe issue fit for review and imposing hardship, even before possible future enforcement actions); *Babbitt v. Farm Workers,* 442 U.S. 289, 297-303 (1979) (constitutional challenge to statutory provisions relating to election procedures and consumer publicity reviewable before the challenged provisions are actually applied to specific cases); *Andrus v. Idaho,* 445 U.S. 715, 722-25 (1980) (whether agency had mandatory statutory duty to withdraw lands for state, was reviewable, even though state's application was pending and agency had not yet decided it); *Suitum v. Tahoe Regional Planning Agency,* —— U.S. ——, 117 S.Ct. 1659, 1669-70 (1997) (taking claim ripe where agency determined question of applicability and only discretionary step left was approval of particular transfer applications).

III. THE OPINION DECIDES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

Whether a citizen can institute a district court citizen suit after agency inaction in the initial regulatory phase, and before threatened future action, rather than awaiting any such possible action and seeking to reverse it in the circuit court, is an important and recurring matter warranting this Court's review.

These statutory and ripeness issues bear on whether or not the salutary role of citizen suits is to be unduly truncated. ". . . [C]itizen groups are not to be treated as nuisances or trouble makers but rather as welcomed participants in the vindication of environmental interests . . . ." *Friends of the Earth v. Cary*, 535 F.2d 165, 172 (2nd Cir. 1976). There is no basis for saying that a citizen suit statute "applies to environmentalists alone." *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 1163 (1997). It applies to claims against the government which assert "overenforcement" as well as "underenforcement" of environmental laws. *Id.* The "welcomed participants," therefore, must include business groups. *E.g. Motor Vehicle Manufacturers*, 647 F.2d at 677. This should be especially true of small businesses. *See*, Section 202, P.L. 104-121, 110 Stat. 857, Section 2, P.L. 96-354, 94 Stat. 1164; *see also* Stephen Breyer, *Regulation and its Reform* (Harvard Univ. Press 1982) at 269-70, R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Brookings Inst. 1983) at 365.

Jurisdiction in a U.S. district court, where extra-record evidence can be introduced and factual disputes resolved, is often necessary in a failure-to-study case. The "district court has the authority" and "the practical ability" to compile any necessary record relating to such inaction. *Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 656 (7th Cir. 1986). For example, in the case at bar, petitioners introduced, without objection or contradition by EPA,

expert testimony by Professor Chameides about Congress' use of scientific terms in Section 183(e) and that of Professor Viscusi about its use of economic terms. Furthermore, EPA had the opportunity, which it did not utilize below, to further explain why it did not, or could not, perform its nondiscretionary study and listing duties.

District court jurisdiction over first-step inaction cases is important also, because Section 304(a) expressly gives such a court remedial power to "order [EPA] to perform such . . . duty." 42 U.S.C. § 7604(a). Thus, here, the District Court had explicit statutory power to issue a mandatory injunction directing EPA to perform its unperformed study and listing duties. *See Pennsylvania v. EPA*, 618 F.2d at 997.

EPA's proceeding to the final phase of the Section 183(e) regulatory process, the proposal and promulgation of 21 scheduled regulations over an eight-year period, without having first performed the necessary prerequisites, the study and the list, will insure that a massive new rulemaking program will fail to realize its promise. Absent the economic and scientific foundation mandated by Congress, EPA's future regulations are certain to produce four perverse outcomes. First, certain socially valuable products which do not materially contribute to ozone nonattainment in any area will be outlawed without any need to do so. Second, other products will be unnecessarily over-regulated, resulting in impaired quality, increased cost, or both. Third, still other products will be underregulated denying the public the benefit of emission reductions which could have contributed to ozone attainment and been achieved cost-effectively. Fourth, some products which merit some form of regulation in one of the four groups will escape any control whatsoever. In short, for eight years EPA will have been regulating thousands of products as part of a massive new regulatory program, but doing so totally blind.

EPA's failure to perform its study and listing duties under Section 183(e) cannot be adequately reviewed and remedied by later review and reversal of one or more regulations by the D.C. Circuit. This is so for five reasons.

First, there is a substantial risk that EPA will, as stated in the Schedule, adopt 21 major product regulations during the next eight years without ever having done the homework commanded by Congress and without any judicial review of that failure. Petitioners constitute the only group in the country which has sued to date to compel performance of EPA's Section 183(e) study and listing duties. Obviously, companies whose products are not within the 21 groups presently scheduled for regulation cannot be expected to take any action. Nor can those which are within one of the 21 groups, but are satisfied (or even delighted) with the regulations to be adopted, or otherwise unwilling or unable to challenge them. Even as to architectural coatings, there is no certainty that EPA will adopt a regulation in the future and that it will be challenged by petitioners or anyone else in the D.C. Circuit under Section 307. Thus, it is possible that no Section 307 petition will ever be filed in the D.C. Circuit asserting the study and listing claims at issue here and that EPA's inactions will never be reviewed, let alone remedied.

Second, if any such claims are ever raised in the D.C. Circuit, EPA can be expected to argue that the D.C. Circuit lacks jurisdiction thereof under Section 307. In cases where failures to perform mandatory duties are followed by final action, EPA often argues in the circuit court that failures to act cannot be reached under Section 307. *E.g., Abramowitz v. EPA*, 832 F.2d 1071, 1075 (9th Cir. 1987); *Kamp v. Hernandez*, 752 F.2d at 1454; *Indiana and Michigan Electric Co. v. EPA*, 733 F.2d at 490. Thus, petitioners—and the public—may never have their day in court to challenge EPA's breaches of nondiscretionary duty at issue here.

Third, if any product regulation is ever reviewed and reversed by the D.C. Circuit on the ground that EPA had failed *ab initio* to perform its study and listing duties, that Court may lack statutory power to order EPA to perform those duties, or be unwilling to exercise any such power. CAA Section 307(d)(9) authorizes the D.C. Circuit Court to "reverse" EPA's rulemaking "action." The Seventh Circuit, for example, has held that it has no authority to compel EPA to perform nondiscretionary duties. *Bethlehem Steel Corp. v. EPA*, 782 F.2d at 654-56. Even if a circuit court had such authority, it might be reluctant to exercise it to issue mandatory injunctive relief. *E.g., id.* at 649-50, 656. Thus, the public would be denied the benefit of a court order compelling EPA to perform the initial study and listing duties.

Fourth, even if any one regulation is reversed, all the regulations adopted by EPA prior thereto may nevertheless remain in effect even though the necessary predicates therefore will have been lacking. Any person aggrieved by a prior regulation may theoretically file his own petition for review and reversal of such regulation in the D.C. Circuit and attempt to assert collateral estoppel. But, in all probability, the 60 day statute of limitations, 42 U.S.C. § 7607(b)(1), will already have run, negating the practical effectiveness of that possibility. Thus, as many as 20 major rules—adopted illegally and without the factual foundation mandated by Congress—would remain the law of the land.

Fifth, it is possible that EPA would time rule adoptions and challengers would time petitions so that mupltiple D.C. Circuit Court petitions attempting to raise the study and listing failures will be timely filed. But this, of course, necessarily involves the specter of multiple litigation. It would be far more officient to resolve the study and listing issues in one early district court case, rather than in multiple circuit court cases after-the-fact.

Accordingly, one early district court suit to compel EPA to perform its study and listing duties before starting to propose and adopt regulations is far superior to any of the alternatives—no later circuit court petition, one such petition, or multiple such petitions.

The jurisdictional issues petitioners ask the Court to review are important, not just to carry out the manifest will of Congress behind Section 193(e), but behind numerous other CAA provisions which mandate that EPA study sources of pollution before regulating them. *See* Rogers, *Environmental Law: Air and Water* (West 1986) § 3.1(3). And CAA Section 304(a) was only the first of at least 16 environmental citizen suit statutes Congress adopted. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682-83 n.1 (1983). Even absent an environmental statute with a bifurcated jurisdictional scheme, the question of when inaction becomes ripe for review frequently arises under the Administratve Procedure Act. 5 U.S.C. § 706(1) (court shall "compel agency action unlawfully withheld . . .").

Thus, it is important that this Court determine whether, after EPA has failed to perform nondiscretionary duties in the initial phase of a regulatory process, an aggrieved citizen can sue in a district court to compel performance of those duties, even though there is a potential that he may be able to sue later in a circuit court to review and reverse one of the many regulations which will have been adopted during the final phases of that process without the benefit of compliance with the necessary predicates.

CONCLUSION

The decision below improperly restricts the split jurisdictional system of the CAA and denies petitioners the immediate opportunity to challenge EPA's failure to perform nondiscretionary duties. Requiring petitioners to wait until any final rule is adopted in order to challenge the failure to complete required precursors thereto subverts

Congress' intent in bifurcating jurisdiction between the district and circuit courts. Only by allowing an immediate review of EPA's failures can the orderly process of rulemaking be maintained. Unless such challenges are permitted, EPA will continue to engage in rulemaking that is the equivalent of constructing houses without first completing the foundations. Because this inverted sequence is not unique to EPA, the questions of when and where challenges to inaction may be brought are of great importance.

For these reasons, a writ of certiorari should issue.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Feb. 13, 1997]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 96-6306 WMB (CWx)

DUNN-EDWARDS CORPORATION; SMILAND PAINT COMPANY; GEMINI COATINGS; INC.; HANLEY PAINT MANUFACTURING CO., INC.; JENNISON INDUSTRIES; CONCO PAINT COMPANY; TRIANGLE COATINGS, INC.; TRINITY COATINGS COMPANY; WELLBORN PAINT CORPORATION; X-I-M PRODUCTS, INC.; HIRSCHFIELD'S PAINT MANUFACTURING, INC., WAMPLER INDUSTRIAL COATINGS; PRESERVO PAINT & COATINGS MANUFACTURING; KUSH PAINT COMPANY; FARRELL-CALHOUN PAINT; THE FLOOD COMPANY; INDURON COATINGS, INC.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; CAROL M. BROWNER, Administrator, MARY D. NICHOLS, Assistant Administrator for Air and Radiation, JOHN S. SEITZ, Director of Office of Air Quality Planning and Standards; BRUCE JORDAN, Director of Emissions Standards Division, THOMAS E. KELLY, Small Business Advocacy Chairperson,

Defendants.

JUDGMENT

Defendants' Cross-Motion for Summary Judgment having come on regularly for hearing on December 16, 1996 before the Honorable Wm. Matthew Byrne, Chief Judge of

the United States District Court for the Central District of California, Defendants appearing through their counsel, and Defendants appearing through their counsel, the Court having considered the pleadings, evidence presented, and the oral argument at the time of the hearing,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants' Cross-Motion for Summary Judgment be granted and judgment is hereby entered for Defendants.

DATED: This 13 day of Feb., 1997.

/s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
Chief Judge
United States District Court

PRESENTED BY:

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division

/s/ Katherine A. Dreyfus
KATHERINE A. DREYFUS
Trial Attorney
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ATTORNEYS FOR DEFENDANTS

APPENDIX B

[Filed Aug. 27, 1997]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-55561

D.C. No. CV-96-06306-WMB

DUNN-EDWARDS CORPORATION; SMILAND PAINT CO.; GEMINI COATINGS INC.; CONCO PAINT COMPANY; TRIANGLE COATINGS, INC.; TRINITY COATINGS CO.; WELLBORN PAINT CORP.; X-I-M PRODUCTS, INC.; HIRSHFIELDS PAINT MANUFACTURING INC.; WAMPLER INDUSTRIAL COATINGS; PRESERVO PAINT & COATINGS MANUFACTURING; KUSH PAINT COMPANY,

Plaintiffs-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; CAROL M. BROWNER, Administrator, MARY D. NICHOLS, Assistant Administrator for Air and Radiation, JOHN S. SEITZ, Director of Office of Air Quality Planning and Standards; BRUCE JORDAN, Director of Emissions Standards Division, THOMAS E. KELLY, Small Business Advocacy Chairperson,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., Chief Judge, Presiding

Argued and Submitted August 5, 1997
Pasadena, California

Before: BROWNING, BRUNETTI, and TROTT, Circuit Judges.

ORDER *

I.

Plaintiffs challenge various aspects of the rulemaking process governed by Section 183(e) of the Clean Air Act ("CAA"), which directs the United States Environmental Protection Agency ("EPA") to conduct a study and then to promulgate regulations to control emissions of volatile organic compounds from consumer and commercial products. We lack jurisdiction to consider these challenges.

The EPA has not promulgated final rules or otherwise taken any other final action that is reviewable. Although CAA Section 304(a)(2) authorizes citizen suits against the EPA when the agency fails to perform "any act or duty . . . which is not discretionary," 42 U.S.C. § 7604 (a)(2), Plaintiffs have not demonstrated that the EPA has failed to perform any nondiscretionary duty. *See Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1354 (9th Cir. 1978).

Moreover, CAA Section 307(b)(1) provides that a "petition for review of . . . any . . . nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia," 42 U.S.C. § 7607(b)(1), but Plaintiffs filed this petition for review in the United States District Court for the Central District of California.

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* This order is not appropriate for publication and may not be cited to or by the courts of this circuit, except as provided by 9th Cir. R. 36-3.

II.

Plaintiffs challenge the proposed architectural coatings rule for alleged violations of statutes establishing procedural requirements for rulemaking in this area. We lack jurisdiction to consider these challenges as well.

Even if we assume the EPA failed to perform the nondiscretionary duty of publishing a statement of basis and purpose as required by CAA Section 307(d)(3), the district court lacked jurisdiction to consider such a claim because Plaintiffs failed to provide the EPA with the 60-day notice required for a Section 304(a)(2) citizen suit. *See* 42 U.S.C. § 7604(b)(2).

The judicial review section of the Unfunded Mandates Reform Act of 1995 ("UMRA") provides that with regard to a petition for review of an agency's compliance with UMRA's requirements, "the provisions of such other Federal law shall control all other matter, such as . . . the time for and manner of seeking review and venue. . . ." 2 U.S.C. § 1571(a)(5). Thus, jurisdiction over Plaintiffs' UMRA claim is governed by the CAA's judicial review provisions, which limit review to final agency action.

Finally, the judicial review provision of the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, does not provide for judicial review of agency compliance with the particular requirements allegedly violated here. *See* 5 U.S.C. § 611(a).

DISMISSED for lack of jurisdiction.

APPENDIX C

[Filed Feb. 9, 1998]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-55561

D.C. No. CV-96-06306-WMB

DUNN-EDWARDS CORPORATION; SMILAND PAINT CO.; GEMINI COATINGS INC.; CONCO PAINT COMPANY; TRIANGLE COATINGS, INC.; TRINITY COATINGS CO.; WELLBORN PAINT CORP.; X-I-M PRODUCTS, INC.; HIRSHFIELDS PAINT MANUFACTURING INC.; WAMPLER INDUSTRIAL COATINGS; PRESERVO PAINT & COATINGS MANUFACTURING; KUSH PAINT COMPANY,

Plaintiffs-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; CAROL M. BROWNER, Administrator; MARY D. NICHOLS, Assistant Administrator for Air and Radiation; JOHN S. SEITZ, Director of Office of Air Quality Planning and Standards; BRUCE JORDAN, Director of Emissions Standards Division; THOMAS E. KELLY, Small Business Advocacy Chairperson,

Defendants-Appellees.

ORDER

Before: BROWNING, BRUNETTI, and TROTT, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.